Supreme Court, U.S.
FILED
DEC 9 1994
OFFICE OF THE CLERK

No. 94-850

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

FRAN T. BROWN,

Petitioner,

v.

FLORIDA UNEMPLOYMENT APPEALS COMMISSION AND JACOBS AND GOODMAN, P.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN W. FOSTER, SR.
(COUNSEL OF RECORD)
ROBERT W. THIELHELM, JR.
BAKER & HOSTETLER
2300 SUN BANK CENTER
200 SOUTH ORANGE AVENUE
POST OFFICE BOX 112
ORLANDO, FLORIDA 32802
(407) 649-4000
Counsel for Respondent

December, 1994

18 pp

QUESTION PRESENTED

Whether the Fifth District Court of Appeal of Florida was correct when it affirmed the Appeals Referee's decision finding that the Petitioner had voluntarily left her employment without good cause attributable to her employer, on the basis that the appellate court lacked authority to interfere with an administrative decision based on an acceptable view of the evidence and should not substitute its judgment for the conclusions of the Appeals Referee.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

CONCLUSION 13

TABLE OF AUTHORITIES

PAGE

CASES

Baker v. General Motors Corp.,
478 U.S. 621 (1986) 7, 8, 9

Board of Directors of Rotary Int'l. v. Rotary Club, 481 U.S. 537 (1987) 3

Brown v. Unemployment Appeals Commission and Jacobs and Goodman, P.A.,
633 So.2d 36 (Fla. 5th DCA 1994) 1

Exxon Corp. v. Eagerton,
462 U.S. 176 (1983) 4

Harris v. Forklift Systems, Inc.,
114 S.Ct. 367 (1993) 7

Meritor Savings Bank v. Vinson,
477 U.S. 57 (1986) 7

N.L.R.B. v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) 5

Nash v. Florida Indus. Comm'n.,
389 U.S. 235 (1967) 7, 8, 9

Newsday, Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840, 844-45 (2d Cir. 1990), *cert. denied*, 499 U.S. 922 (1991) 11

Penn v. Florida Defense Fin. and Accounting Serv. Center Auth., 623 So.2d 459 (Fla. 1993) 5n.2

Stroehman and Bakeries v. Local 776, 969 F.2d 1436 (3d Cir. 1992) 11

Trushin v. State, 425 So.2d 1126 (Fla. 1982) 5n.2

U.S. v. Johnson, 268 U.S. 220 (1925) 5, 12n.5

Webb v. Webb, 451 U.S. 493 (1981) 3

SECONDARY AUTHORITIES

28 U.S.C. §1257 3

29 C.F.R. §1604.11(d) 10

Sup. Ct. R. 14.1(h) 2

Sup. Ct. R. 10.1 5

STATEMENT OF THE CASE

Respondent, Jacobs and Goodman, P.A., submits that the Petitioner's Statement of the Case contains inaccuracies and omissions. In response thereto, Respondent adopts the findings of fact and conclusions of law presented by Appeals Referee, Patricia M. Zeis, in her Notice of Decision of Appeals Referee (Petitioner's Appendix at pp. 19a-23a)[1] and the Fifth District Court of Appeal of Florida in *Brown v. Unemployment Appeals Commission and Jacobs and Goodman, P.A.*, 633 So.2d 36 (Fla. 5th DCA 1994) (*en banc*). (Petitioner's Appendix at pp. 1a-17a). Additionally, Respondent emphasizes the following clarifications:

1. Petitioner mischaracterizes the decisions below. The Appeals Referee found that Petitioner had failed to act as a reasonable person in attempting to preserve the employer/employee relationship, and, therefore, Petitioner had voluntarily left her employment without good cause attributable to her employer. (Petitioner's Appendix at pp. 22a-23a). The Florida Unemployment Appeals Commission affirmed, finding "that the decision of the Appeals Referee is in accord with the essential requirements of law . . . ." (Petitioner's Appendix at p. 24a). The Fifth District of Court of Appeal of Florida, *en banc*, affirmed on

---

[1]In support of this Brief in Opposition, Respondent will cite to the record below as follows: (R. at p. ___). Further Respondent will cite to the Appendix to the Petition for Writ of Certiorari as follows: (Petitioner's Appendix at p. ___). Finally, Respondent will cite to the Petition for Writ of Certiorari as follows: (Petition for Writ at p. ___).

the basis that it lacked authority to interfere with an administrative decision based on an acceptable view of the evidence and refused to substitute its judgment for the Appeals Referee's conclusions. (Petitioner's Appendix at pp. 6a-7a).

2. Petitioner asserts that "Brown's harasser was a senior, non-attorney who worked for one of the named partners of the Jacobs and Goodman law firm." (Petition for Writ at p. 4). This statement has no support in the record and is not consistent with Petitioner's testimony below. (R. at pp. 48-49, 57). Petitioner testified that she was not sure what title her harasser held, but that her harasser handled personal injury calls, ran errands and did maintenance on the weekends. (R. at pp. 48-49, 57). Further, the Appeals Referee found that Petitioner's harasser was a "co-worker," who "did not work in a supervisory capacity." (Petitioner's Appendix at p. 20a).

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO PROPERLY PRESERVE A FEDERAL QUESTION

Noticeably absent from Petitioner's Statement of the Case is any indication as to what stage of the proceedings below Petitioner raised the relevant federal issues to be decided by this Court as required by Supreme Court Rule 14.1(h). However, Petitioner appears to assert that Petitioner's jurisdictional brief to the Supreme Court of Florida raised

the relevant federal issues in a manner sufficient to establish the jurisdiction of this Court. (*See* Petition for Writ at p. 2, n. 1).

The vague references to federal law and public policy contained in Petitioner's jurisdictional brief to the Supreme Court of Florida are insufficient to properly preserve this Court's appellate jurisdiction over state court judgments under 28 U.S.C. §1257. As this Court has held, "there should be no doubt from the record that a claim under a *federal* statute or the *federal* constitution was presented in state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981). Although Petitioner's jurisdictional brief to the Supreme Court of Florida used the terms "federal law" and the "public policy of . . . the federal government," no where did Petitioner expressly rely on any specific provision of federal law. Petitioner did not invoke the Federal Constitution, Title VII of the Civil Rights Act of 1964 ("Title VII"), Section 503(a)(1) of the Social Security Act, or any prior decisions of this Court, *i.e.*, the jurisdictional bases the Petitioner now raises for the first time in her Petition for Writ to this Court.

In fact, nothing in Petitioner's jurisdictional brief to the Supreme Court of Florida indicated that the federal law or public policy was different from the applicable state law or public policy, thereby informing the state court that it had been presented with a federal claim. *See Board of Directors of Rotary Int'l. v. Rotary Club*, 481 U.S. 537, 550 n. 9

(1987). For example, Petitioner's jurisdictional brief to the Supreme Court of Florida merely stated that "[s]exual harassment violates Florida and federal law." (Petitioner's Appendix at p. 27a). Elsewhere, Petitioner's jurisdictional brief to the Supreme Court of Florida stated that "[r]eview of the Fifth District's decision is essential to maintain the integrity and force of this court's decisions and the express public policy of Florida and the federal government." (Petitioner's Appendix at p. 30a).

Additionally, Respondent respectfully submits that this Court lacks jurisdiction to consider these federal issues because the Supreme Court of Florida did not rule on any federal issues. (Petitioner's Appendix at p. 26a). When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983). Significantly, Petitioner has made no attempt to, and cannot, establish that she raised conflicts with federal statutes, decisions of this Court, or the Federal Constitution prior to seeking review in the Supreme Court of Florida.[1]

---

[1]Petitioner cannot point to other stages in the case below to establish that she properly and timely preserved her federal issues. At no time did she or the lower appellate courts, including the Appeals Referee and the Florida Unemployment Appeals Commission, address or raise any federal issues. Even the Petitioner's Motion for Certification of a Question of Great Public Importance to the Fifth District Court of Appeal of Florida failed to raise or assert a conflict with the Federal Constitution, federal statutes or this Court's decisions.

As Petitioner is unable to make such a showing, it must therefore "be assumed" that the Supreme Court of Florida failed to pass on the federal issues due to her failure to raise them at any stage during the proceedings below.[2]

II. CERTIORARI SHOULD BE DENIED SINCE THERE IS NO "SPECIAL OR IMPORTANT" REASON TO GRANT REVIEW

This case does not present "special or important reasons" to justify further review by this Court. Sup. Ct. R. 10.1. The instant case does not involve a previously unsettled issue of law, create new law or involve a conflict with the Federal Constitution, federal statutes or prior decisions of this Court. Petitioner's mischaracterization of the decisions below is an obvious attempt to exaggerate their precedential effect and to convert that which is a factual determination into a basis for the issuance of a writ of certiorari. As this Court has aptly observed in the past, "[w]e do not grant certiorari to review evidence and discuss specific facts." *U.S. v. Johnson*, 268 U.S. 220, 227 (1925). *See N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n. 8 (1981) (grant of certiorari improvident as question of fact does not merit review).

---

[2]The general practice of the Florida appellate courts is to refuse to consider issues raised for the first time on appeal. *See Penn v. Florida Defense Fin. and Accounting Serv. Center Auth.*, 623 So.2d 459, 462 (Fla. 1993); *Trushin v. State*, 425 So.2d 1126, 1130 (Fla. 1982).

Petitioner has simply ignored the Fifth District Court of Appeal of Florida's express acknowledgment of the "correct legal principal applicable to this case" quoted by Judge Cobb as follows:

> Our affirmance is based primarily upon the familiar principle that this Court lacks authority to interfere with an administrative decision based upon an acceptable view of the evidence below. We simply may not substitute our judgment for the referee's conclusion . . . . (Citations omitted).

This case was decided, *en banc*, by the Fifth District Court of Appeal of Florida based upon all the facts and record evidence. Obviously, future cases in this area will continue to be decided on a case-by-case basis. It is simply unnecessary to allow Petitioner additional argument. No special or important reasons to grant review exist, and Petitioner is merely seeking review of factual determinations.

III. THE DECISIONS BELOW DO NOT THWART AND HINDER THE ENFORCEMENT OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND SECTION 503(a)(1) OF THE SOCIAL SECURITY ACT AND DO NOT CONFLICT WITH AND UNDERMINE THIS COURT'S PREVIOUS DECISIONS

Petitioner urges that the decisions below "violate the Supremacy Clause of the Constitution because they thwart and hinder enforcement of Title VII of the Civil Rights Act of 1964 and Section 503(a)(1) of the Social Security Act" and that "these decisions conflict with and undermine this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993)." (Petition for Writ at pp. 5-6). In support of her argument regarding violation of the Supremacy Clause, Petitioner relies on *Nash v. Florida Indus. Comm'n.*, 389 U.S. 235 (1967). However, the instant case is clearly distinguishable from *Nash* according to this Court's rationale in *Baker v. General Motors Corp.*, 478 U.S. 621 (1986).

In *Baker*, this Court held that a state statute, declaring an employee ineligible for unemployment compensation if the employee financed a strike other than by paying regular union dues, was not preempted by portions of the National

Labor Relations Act ("NLRA") giving employees the right to engage in collective bargaining. *Id.* at 635-638. This Court in *Baker* distinguished *Nash* as follows:

> Thus, the central distinction between the *Nash* case and this one is that of the distinction between involuntary and voluntary unemployment that was recognized at the inception of the Social Security Act. The decision to file an unfair labor practice charge--even though it may in fact motivate a retaliatory discharge--cannot be treated as a voluntary decision to cause one's own unemployment without undermining an essential protection in the NLRA. But an employee's decision to participate in a strike, either directly or by financing it, is not only an obvious example of causing one's own unemployment--it is one that furthers the federal policy of free collective bargaining regardless of whether or not the state provides compensation for employees who are furloughed as a result of the labor dispute.

Id. at 637-638.

In the instant case, the Appeals Referee determined that the Petitioner had failed to act as a reasonable person in attempting to preserve the employer/employee relationship and, therefore, concluded that Petitioner had voluntarily caused her own unemployment without good cause

attributable to her employer. Similar to the decision to participate in a strike in *Baker*, Petitioner's refusal to participate in the investigation conducted by Respondent into the alleged harassment including an independent third party investigator (R. at pp. 110-112), Petitioner's admission that she would not return to work even if the harassing co-worker was completely removed from the work place because the harassing co-worker's wife worked for Respondent (R. at pp. 105-106) and Petitioner's refusal to return to work under various circumstances intended to limit her contact with the harassing co-worker (R. at pp. 100-104), provided competent, substantial evidence for the Appeals Referee to determine that Petitioner did not expend reasonable efforts to preserve her employment relationship and, therefore, caused her own unemployment.

Unlike the filing of an unfair labor practice charge in *Nash* which could not be treated as a voluntary decision to cause one's own unemployment without undermining a portion of the NLRA, failing to act as a reasonable person in attempting to preserve the employment relationship can be treated as voluntarily causing one's own unemployment without undermining either Title VII or Section 503(a)(1) of the Social Security Act. As noted by Petitioner, "the objective of Congress in establishing the unemployment compensation insurance program, as part of the Social Security Act, was to provide a substitute for wages lost during a period of unemployment which is not the fault of the employee." (Petition for Writ at p. 8). Obviously, an employee, such as Petitioner, who fails to act reasonably to

preserve the employer/employee relationship, is not an individual unemployed through no fault of her own.

Moreover, to hold that an employee is automatically entitled to unemployment compensation benefits when sexual harassment allegations are involved, irrespective of the actions taken by either the employee or the employer, would contradict the basic tenets of Title VII and the laws against sexual harassment. Notably, the Equal Employment Opportunity Commission Guidelines impose liability on an employer for sexual harassment between fellow employees[3] where the employer knew or should have known and failed to take immediate corrective action. 29 C.F.R. §1604.11(d)(1994). Denying unemployment compensation benefits to Petitioner because she failed to act as a reasonable person in attempting to preserve the employment relationship is also consistent with EEOC's Guidelines for enforcing Title VII in that it promotes and facilitates the employer's ability to fulfill its obligation to prevent and address occurrences of sexual harassment in the work place.

---

[3]As noted previously, Petitioner's Statement of the Case mischaracterizes Petitioner's harasser as a "senior, non-attorney." Petitioner appears to imply that her harasser was more than a co-worker or fellow employee. Yet, as clarified by Respondent, such an implication is not supported by the record and is inconsistent with the factual findings of the Appeals Referee. *Infra* at p. 2. Petitioner testified that she was not sure what title her harasser held, but that her harasser handled personal injury calls, ran errands and did maintenance on the weekends. (R. at pp. 48-49, 57). The Appeals Referee found that Petitioner's harasser was a "co-worker," who "did not work in a supervisory capacity." (Petitioner's Appendix at p. 20a).

See generally Stroehman Bakeries, Inc. v. Local 776, 969 F.2d 1436, 1442 (3d Cir. 1992), *cert denied*, 113 S.Ct. 660 (1992); *Newsday, Inc. v. Long Island Typographical Union, No. 915*, 915 F.2d 840, 844-45 (2d Cir. 1990), *cert. denied*, 499 U.S. 922 (1991). Therefore, the decisions below are not only consistent with the stated purpose of the unemployment compensation law but also consistent with the laws and decisions prohibiting sexual harassment in the work place.

IV. THE RESULT SOUGHT BY PETITIONER WOULD RESULT IN CONFUSION AND CHAOS IN THE LAW

Ultimately, Petitioner asks this Court to do that which Petitioner has already expressly acknowledged it cannot do, *i.e.*, equate the tests for recovery under Title VII and the Florida Unemployment Compensation law.[4] The question presented by the Petition for Writ is "[w]hether a state may refuse to pay unemployment insurance benefits to employees forced to leave their jobs because of sexual battery and harassment in the work place?" In essence, Petitioner requests this Court to determine that all victims of sexual

---

[4]Petitioner acknowledged that "the issue in this appeal is not whether Jacobs and Goodman would be liable to Ms. Brown under Title VII or any other sexual harassment laws. The test for recovery under Title VII and the Florida Unemployment Compensation Law are not identical and should not be confused." Reply Brief for Appellant filed by Petitioner in the Fifth District Court of Appeal of Florida at p. 13, n. 6.

harassment are automatically entitled to unemployment compensation benefits.[5] Such a determination would improperly require unemployment compensation appeals referees across the nation to make factual and legal determinations of whether actionable sexual harassment under Title VII has occurred before awarding unemployment compensation benefits.

If a victim of sexual harassment is automatically entitled to unemployment compensation benefits, then an unemployment compensation appeals referee would no longer be concerned with the standards for awarding unemployment compensation benefits when confronted with a claimant alleging sexual harassment; rather, the unemployment appeals referee would be required to make a determination of liability under Title VII. Clearly, Congress did not intend to equate Title VII with Section 503(a)(1) of the Social Security Act. Such a result would lead to confusion in the enforcement of both Title VII and Section 503(a)(1) of the Social Security Act.

---

[5]Notably, if Petitioner's contention is *not* that all victims of sexual harassment are automatically entitled to unemployment compensation benefits, *i.e.*, victims of sexual harassment may be entitled to unemployment compensation benefits depending on the circumstances, then Petitioner is obviously improperly requesting this Court to review the evidence. *See U.S. v. Johnson*, 286 U.S. 220, 227 (1925).

CONCLUSION

For the foregoing reasons, Petitioner has failed to demonstrate that a grant of certiorari is appropriate, and therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN W. FOSTER, SR.
Counsel of Record
ROBERT W. THIELHELM, JR.
BAKER & HOSTETLER
2300 SunBank Center
200 South Orange Avenue
Post Office Box 112
Orlando, Florida 32802
(407) 649-4000
Attorneys for Respondent